Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Amendment of Parts 1, 21, 73, 74 and 101 of | ) | WT Docket No. 03-66 |
| the Commission's Rules to Facilitate the | ) | RM-10586 |
| Provision of Fixed and Mobile Broadband Access, | ) | |
| Educational and Other Advanced Services in the | ) | |
| 2150-2162 and 2500-2690 MHz Bands | ) | |

**COMMENTS OF THE**
**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**
**IN RESPONSE TO THE**
**FURTHER NOTICE OF PROPOSED RULEMAKING AND**
**REGULATORY FLEXIBILITY ANALYSIS**

The National Telecommunications Cooperative Association (NTCA)[1] submits these comments in response to the Commission's Notice of Proposed Rule Making (NPRM) in the above-referenced docket. While NTCA has reservations about some of the FCC's decisions in the accompanying order,[2] the comments here are limited to the size of the geographic areas proposed to be licensed and the Commission's use of bidding credits in areas that do not voluntarily transition.

[1] NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

[2] Specifically, NTCA believes that the transition plan that was adopted is unfair and unworkable for small and rural licensees currently operating in the band.

## I. THE SPECTRUM SHOULD BE LICENSED ACCORDING TO SMALL LICENSE TERRITORIES

In its NPRM, the FCC proposes to license available spectrum in the band using a geographic licensing scheme. While NTCA agrees that a geographic area licensing scheme is appropriate for the spectrum, we do not agree with the Commission's proposal to license the spectrum according to MEAs and EAs. Rural companies have been effectively using the spectrum for many years and will continue to do so given the appropriate opportunity. Small and rural companies will only be afforded the chance to compete for the spectrum if it is licensed according to small territories.

As the Commission is well aware, small carriers with localized business plans cannot compete with large carriers at auction. A large carrier is typically interested in serving the city and the rural carrier interested in serving the rural population. A large license territory forces the two carriers to bid against each other, even though they may not actually be interested in serving the same territory. A bidding credit for the small carrier, while useful, does not make up for the disparity in resources. The rural carrier stands little chance of obtaining a large geographic area spectrum license.

The Commission proposes to license the lower and upper spectrum bands according to MEAs. The Commission states that the low-power use of this spectrum may offer "particularly significant opportunities for providing ubiquitous mobile service."[3] The Commission reasons that the larger the service area is, the more likely the licensee would be able to offer service anywhere that a potential customer may need it.[4]

The Commission's reasoning is flawed. Just because a licensee could offer service anywhere that a potential customer may need it, does not mean that a licensee

[3] NPRM, ¶ 275.
[4] *Id*.

would actually do so. History has proven that when spectrum is licensed according to large license territories, vast areas of the country are left without service. Smaller-than-MEA license territories is appropriate for the upper and lower band segments.

The Commission proposes to license the middle band segment according to EAs. The Commission correctly recognizes that license areas smaller than MEAs will better meet the needs of licensees engaged in high power operations. While licensing according to EAs is better for small and rural carriers than is licensing according to MEAs, the Commission should consider licensing according to even smaller areas. EAs are very large license territories to small businesses. EAs group major metropolitan areas with rural areas. A small business with a plan to provide service to a rural community cannot effectively compete at auction with a large carrier interesting in serving a nearby city.

High power operations in the MDS/ITFS spectrum band have proven particularly useful in rural areas. Many small providers have developed successful wireless cable businesses. Licensing the spectrum according to large EAs may prevent further small business participation in this band. NTCA submits that the mid-band segment should be licensed according to the much smaller BTAs or MSAs/RSAs.[5]

The Commission once again puts forth partitioning and spectrum leasing as the means to get spectrum to parties interested in serving areas the licensee is uninterested in. While secondary markets may turn into a useful tool for rural carriers interested in serving a portion of a larger carrier's service territory, to date the opportunity has been available for only a handful of carriers. If the opportunity does materialize for the spectrum at issue, it will likely materialize years after the spectrum is initially licensed.

[5] NTCA notes that MSA/RSA license territories proved successful in the lower 700 MHZ spectrum auction.

Before it will consider negotiating with a rural carrier, a large carrier must first determine how it will use the spectrum, what spectrum it is willing to part with and for what price. The desired outcome, if it occurs at all, is likely to take years to achieve. There is a need for this spectrum in rural areas. Licensing the spectrum according to smaller license territories is the only way to meet the need.

Further, the Commission must take into consideration Section 309(j) when it determines spectrum policies.[6] Section 309(j) directs the Commission to consider policies that provide spectrum opportunities for small businesses, including rural telephone companies. It has long been NTCA's position that only primary spectrum opportunities satisfy 309(j). Section 309(j)(3) instructs the Commission to design competitive bidding systems in a manner that will disseminate licenses among a wide variety of applicants, including small businesses and rural telephone companies. Secondary opportunities do not involve competitive bidding and do not satisfy 309(j)(3). Secondary markets are also not opportunities created by the Commission, nor do they "ensure" that small businesses and rural telephone companies have the opportunity to participate in the provision of spectrum based services.[7] Secondary market opportunities exist for small businesses and rural telephone companies only when other licensees determine that it is in their best interests to negotiate and strike a deal with smaller carriers. The adoption of rules that permit secondary markets in this spectrum band cannot be used by the Commission as evidence of its Section 309(j) compliance. Small license territories are appropriate for this spectrum and are the only way for the Commission to satisfy its statutory duties.

---

[6] *See* 47 U.S.C. § 309(j).
[7] 47 C.F.R. § 309(j)(4).

## II. THE COMMISSION'S BIDDING CREDIT PROPOSAL IS FLAWED

NTCA is particularly concerned about the Commission's proposals regarding bidding credits. In a MEA where no proponent files a plan to initiate the transition to the new band plan, the Commission proposes that current licensees receive non-renewable, modified licenses that permit them to continue operations until a new licensee is prepared to use the spectrum in a manner that is incompatible with incumbent operations. The current licensees would receive bidding offset credits that they could use to either bid on the EBS and BRS spectrum or in any other spectrum auction for which they qualify. The bidding credits would be transferable to any other party.

Bidding credits for future auctions would now be available to small businesses, current MDS/ITFS licensees, and to parties that obtained bidding credits from current MDS/ITFS licensees. Large businesses with the financial means could aggregate bidding credits from several current licensees in a MEA. Following this scenario to its logical conclusion, a small business with a bidding credit would be forced to bid against a large business with several bidding credits. Combine the bidding credit situation and that the EBS/BRS spectrum is also proposed to be auctioned according to large MEAs, small businesses stand little chance of successful bidding. If current licensees are permitted to hoard the bidding credits and use them in future auctions, the policy would have a negative impact on small businesses for years to come.

Since the FCC has done away with set aside spectrum for designated entities, bidding credits have been the only method employed by the Commission to satisfy its 309(j) obligations. The Commission typically reasons that bidding credits based on gross revenues provide small businesses with the opportunity to compete with larger businesses at auction.  The Commission's bidding credit proposal is nonsensical and completely contrary to Congress' intent when it enacted Section 309(j).  Section 309(j) directs the Commission to establish safeguards that ensure that licenses are disseminated among a wide variety of applicants.  The bidding credit proposal seems a move in the opposite direction.  The Commission's consolation prize to current licensees forced off the spectrum should be something other than transferable bidding credits.

## III. CONCLUSION

The Commission has an obligation to provide spectrum opportunities to small businesses and rural telephone companies.  It must also mitigate the negative impact of its rule changes on small businesses.  While changes to the MDS/ITFS spectrum band are necessary to accommodate new uses, the Commission's new rules and proposed rules put small carriers in a difficult situation.  Several small carriers have been successfully providing service to rural consumers using the MDS/ITFS spectrum band for years.  The transition will be expensive and burdensome for small carriers seeking to continue to provide service.  The Commission should not now add insult to injury by also adopting auction rules that abandon the protections of Section 309(j) and clearly favor the plans of large business at the expense of community-based businesses.  Any spectrum made available because of the transition should be auctioned according to small geographic service territories and the Commission's proposal to offer transferable bidding credits should be rejected.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: _/s/ L. Marie Guillory____
L. Marie Guillory
(703) 351-2021

By: _/s/ Jill Canfield________
Jill Canfield
(703) 351-2020

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
703 351-2000

January 10, 2005

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WT Docket No. 03-66, RM-10586, FCC 04-135, was served on this 10th day of January 2005 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail Malloy
Gail Malloy

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554

Best Copy and Printing, Inc.
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554